IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

No. .....

LURA VIRGINIA BICKEL LEE CARTER,
Petitioner,

vs.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a corporation, and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner Lura Virginia Bickel Lee Carter (Mrs. Carter) respectfully petitions the Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on rehearing June 23, 1971.

OPINION BELOW

The opinion on rehearing of the United States Court of Appeals for the Fifth Circuit, Rives, J., dissenting, is not yet reported and is reproduced in the appendix together with the judgment of the Court. The final judgment of the District Court is unreported. It is not an opinion and summarily denied petitioner the relief she sought. The only pertinent part is quoted in the Statement of the Case.

JURISDICTION

The original opinion of the Court of Appeals was filed on April 7, 1971, Rives, J., concurring in the result. Timely petitions for rehearing were filed by Mrs. Carter and by the United States. An opinion on rehearing was filed on June 23, 1971, Rives, J., dissenting, this opinion operating, *inter alia*, to deny the petition of Mrs. Carter for rehearing or certification of a question of law to the Supreme Court of Florida.[1]

STATEMENT OF THE CASE

The respondent The Connecticut Mutual Life Insurance Company (Connecticut Mutual), brought a mortgage foreclosure proceeding in the Circuit Court of Hernando County, Florida, against several parties including Mrs. Carter and the United States of America seeking foreclosure of a first mortgage on 1736 acres of real estate in rural areas of Pasco and Hernando Counties, Florida which encompassed a homestead and nearby citrus lands. The complaint joined Mrs. Carter as defendant as a joint obligor with her late husband on a mortgage note secured by the

1. Florida Appellate Rule 4.61; Section 25.031, Florida Statutes (reproduced in appendix); see also *Clay* v. *Sun Insurance Office*, 363 U.S. 207 (1960).

first mortgage. The complaint specified that it was maintained under Chapter 702, Florida Statutes,[2] and sought sale under Section 702.02, Florida Statutes (Supp. App. 18).[3]

The United States was joined as a defendant by virtue of a crop lien executed by the late husband of Mrs. Carter and herself encumbering the property; it removed the case to the United States District Court for the Middle District of Florida pursuant to Title 28, United States Code, Sections 1444 and 2410 (Supp. App. 1-3). Thereafter summary judgment of foreclosure was granted in favor of the Connecticut Mutual (App. 2-13).

Subsequently, a foreclosure sale was conducted by Special Master. Connecticut Mutual bid in the property for the indebtedness due it of $434,190.37, leaving unsatisfied the debt due to the United States of approximately $500,000. On December 22, 1969, the Special Master sought confirmation of the sale (Supp. App. 53-55). Mrs. Carter on December 29, 1969, filed objections to confirmation (App. 13-16) alleging that the bid was grossly disproportionate to the value of the property, that the Farmers Home Administration had appraised the property in excess of $1,000,000, that the advertising for sale was inadequate, that Mrs. Carter was informed by Connecticut Mutual that if she would pay $25,000 before the sale, Connecticut Mutual would seek a postponement of the sale and permit Mrs. Carter to have 90 additional days to pay up any arrearage, and that in reliance on said promise, Mrs. Carter offered the Special Master and to the attorney for Con-

2. Pertinent portions are set forth in an appendix to the petition.

3. Abbreviations utilized herein are "App." and "Supp. App." and refer to the printed appendix and supplemental appendix in the Court of Appeals.

necticut Mutual $25,000 prior to the actual sale, which offer of payment was declined.

The nature of the objections manifestly involved the taking of testimony or the hearing of evidence in some form. Moreover, a portion of the statutory foreclosure procedure, Section 702.02(5), Florida Statutes, utilized by Connecticut Mutual, expressly required these objections to be considered by the Court.

Instead, without any hearing of any nature on the motion to confirm or the objections, the District Court on January 7, 1970, confirmed the sale, observing (App. 17):

> "One of the defendants, Lura Bickel Lee Carter, has filed objections to confirmation of foreclosure sale. The Court has considered the motion and memorandum thereto, and notes that some of the arguments raised in the objections were previously considered by the Court in an adversary hearing."

The District Court, however, did not directly rule upon the objections. Mrs. Carter then appealed on the failure of the Court to grant her a hearing on her objections. The United States also appealed on the issue of whether its lien was superior to the portion of the claim of Connecticut Mutual representing attorney's fees.

During the course of the appellate proceedings, the United States exercised the statutory right of redemption, Title 28, United States Code, Section 2410(c) by paying Connecticut Mutual the full amount of its mortgage with interest, costs and attorneys' fees. The Court of Appeals originally held the redemption mooted the priority issue, holding at the same time that Mrs. Carter was not entitled to an evidentiary hearing on her objections and was only entitled to a remand for a credit of the amount the United States would have bid had it originally bid at the fore-

closure sale, i.e., the lesser of the investment of the United States or the estimated resale value, 7 CFR 1872.17(b)(3)(VI).

On petitions for rehearing by the United States and Mrs. Carter the Court of Appeals granted the petition of the United States and affirmed the District Court on the priority issue, but denied anew Mrs. Carter's right to a hearing, publishing an identical opinion, denying also a petition for certification to the Supreme Court of Florida. Despite the facts that Mrs. Carter alleged and offered in effect to prove a fair sale would realize payment of equity of her own in the property, and that the United States in its original brief (pages 23-25) did not oppose a new sale, the Court of Appeals *ex mero motu* held that no grounds existed for an evidentiary hearing. It then stated:

> ". . . the statute requires only that the court 'consider' the objections and we find an absence of any indication from the Florida courts that the term 'consider' must be defined to require the convening of a hearing."

In dissent Judge Rives observed:

> "My brothers say 'the statute [Florida Statutes, §702.02(5)] requires only that the court "consider" the objections and we find an absence of any indication from the Florida courts that the term "consider" must be defined to require the convening of a hearing.' . . . So far as I have found, the Florida courts have not had occasion to define 'consider' as used in that statute either way, that is, to require or not to require an evidentiary hearing. I would think that the necessity of a hearing would depend upon the nature of the objections.
>
> In this case, I submit that to meaningfully 'consider' the objections requires that the mortgagor be given an opportunity to prove the facts which she averred.

> The only court which can finally and authoritatively construe the Florida Statute is the Supreme Court of Florida. It seems to me that the ends of justice require us to grant the mortgagor's request that, pursuant to Rule 4.61, Florida Appellate Rules, and Section 25.031, Florida Statutes, we certify an appropriate question to the Supreme Court of Florida for its decision. My brothers decline so to do.
>
> For the reasons stated, I respectfully dissent as to both issues decided."

The effect of the remand is to permit Mrs. Carter to establish a value of her homestead and farm lands at least equal to the debt, and thus defeat a deficiency claim now being asserted by the United States. It denies her the right to establish by evidence that a fair sale price would provide payment of her equity, and collaterally fully reimburse the United States, i.e., the relief denied her could prejudice no other party.

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS MAY DISREGARD AN ESTABLISHED MEANS OF DETERMINING APPLICABLE FLORIDA LAW AND IN LIEU THEREOF FORMULATE BY ITS OWN DECISION A RULE DENYING PETITIONER DUE PROCESS THROUGH AN EVIDENTIARY HEARING ON THE RIGHT OF THE UNITED STATES TO EXTINGUISH HER EQUITY IN HER MORTGAGED HOMESTEAD AND ADJACENT PREMISES.

REASON FOR GRANTING THE WRIT

It is important with respect to administration of justice in the federal courts for this Court to declare that federal courts should avail themselves of easily available means of establishing definitive answers to controlling questions of state law.

Connecticut Mutual sought foreclosure proceedings under Chapter 702, Florida Statutes, and the Court below was necessarily governed by and ostensibly sought to follow the procedures set forth therein.[4]

Section 702.02(5), Florida Statutes, provides in part:

"Value of property.—The value of the property sold by the clerk[5] shall be conclusively presumed to be the amount bid therefor and for which the property was sold at the sale, *unless objection thereto shall be filed in the cause within ten days after the filing of the clerk's certificate of sale. If any objections to said value be filed within such ten day period, such objections shall be considered by the court*; . . ." (Emphasis supplied).

4. Subject, only to the right of redemption granted the United States by Title 28, United States Code, Section 2410.

5. In this case by agreement a Special Master was utilized.

The majority recognized in its opinion that there was an "absence" of Florida law requiring a hearing in circumstances such as were here present. It seemingly equated this with an indication that not having spoken, the courts of Florida would not interpret the applicable statutes to require such a hearing. Judge Rives in dissent accurately pointed out that the Supreme Court of Florida was the only tribunal "which can finally and authoritatively construe the Florida Statute" and "that the ends of justice require us to grant" Mrs. Carter's request that an appropriate question be certified to the Supreme Court of Florida for decision.[6]

This Court in *Clay* v. *Sun Insurance Office*, 363 U.S. 207 (1960), indicated in effect that controlling questions of Florida statutory law need not be decided by a Court of Appeals when on the basis of available materials it could not make a confident guess how the Supreme Court of Florida would construe a statute, and that instead it should properly invoke the Florida certification procedure. We do not read *Clay* as necessarily mandatory, but at the least to express the ordinary and typical procedures to be followed in cases such as the instant one.

In this instance the Court of Appeals made a guess, hardly confident in light of the admitted "absence" of authority, and denied Mrs. Carter a hearing and her final chance to recoup any equity in her homestead and farm.

It is submitted that this Court should now reexamine *Clay* and make it abundantly clear that a federal court in

6. Mrs. Carter first sought certification on petition for rehearing because no issue had been raised earlier as to a right *per se* to a hearing. Connecticut Mutual principally argued procedural defects and lack of good faith, whereas the United States originally had not opposed resale. Such petitions for certification at this time are proper, *Life Insurance Co. of Virginia* v. *Shifflet*, 370 F.2d 555 (5th Cir. 1967); *Green* v. *American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962).

the absence of compelling reasons to the contrary should not undertake to decide questions completely unsettled of Florida statutory law, *at least when a party specifically invokes the certification procedure.*[7]

A fair regard for reasonable demands of federalism and a concern for uniformity of decision of similar causes in state and federal tribunals dictate that the desire of Florida, both judicially and legislatively expressed, to provide authoritative answers to questions of interpretation of Florida law should not be ignored, at least for less than strongly persuasive reasons totally lacking here. Otherwise a valuable device which Florida has pioneered is severely restricted, and may ultimately be relegated to disuse.

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7. The best of all pragmatic reasons is that the federal court has often guessed wrong in cases where no party asked for certification. Compare, e.g., *American Agricultural & Chemical Co.* v. *Tampa Armature Works,* 315 F.2d 856 (5th Cir. 1963) with *Gulf Oil Corp.* v. *Atlantic Coast Line R.R. Co.,* 196 So.2d 456 (DCA Fla. 2nd 1967), *cert. den.* 201 So.2d 893 (Fla. 1967) and *Bello* v. *Union Trust Co.,* 267 F.2d 190 (5th Cir. 1959) with *Glasser* v. *Columbia Federal Savings & Loan Assn.,* 197 So.2d 6 (Fla. 1967). For a characteristically pungent portrayal of this problem see the opinion of Brown, J., in *Ford Motor Co.* v. *Mathis,* 322 F.2d 267, 269, fn. 1 (5th Cir. 1963).

CONCLUSION

This petition presents a substantial question, raising important issues relating to the decision of questions of state law by federal courts. The petition should be granted and the writ of certiorari issued.

Respectfully submitted,

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